Appl — — Judge Davis —

5 Ct Cls 6 Moore Priv Council 420 —

Judge Strong dissents

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~515.~~ ~~294~~ 73

ROBERT H. MONTGOMERY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 1, 1871.

SUPREME COURT OF THE UNITED STATES.

No. 515.

ROBERT H. MONTGOMERY, APPELLANT,

vs.

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INDEX.

	Original.	Print.
Petition	1	1
Amendment of petition	6	4
Traverse	7	4
Final judgment of the court	8	4
Application for an appeal	9	5
Order of court allowing same	9	5
Findings of fact and of law	10	5
Certificate	38	12

1 United States Court of Claims.

R. H. MONTGOMERY }
vs.
THE UNITED STATES. }

The petition of R. H. Montgomery, a resident of the city of New York, who files this petition to the use of Henry M. Martin, a resident of the same city.

The petitioner alleges that, during the year 1862, and for many years prior, he was a resident of the city of New Orleans, and engaged in mercantile operations, and more particularly in buying and selling the produce of the State of Louisiana.

That Major General B. F. Butler, as commander of the military forces of the United States, and by its authority, captured and took military possession of the city of New Orleans and adjacent portions of the State of Louisiana, on or about the 1st of May, 1862.

That, as such military commander, on the 6th of May, 1862, he issued his proclamation in the name and on behalf of the United States, setting forth therein, among other things not necessary to enumerate, "That all persons well disposed towards the United States Government, who shall renew the oath of allegiance to the same, will receive a safeguard of protection to their persons and property from the Army of the United States;" and further, that to such persons "all the rights of property, of whatever kind, will be held inviolate, and subject only to the laws of the United States;" and further, "that all the inhabitants of said city are enjoined to pursue their usual avocations." All of which declarations were made by the authority and had the approval of the United States Government, and was in the furtherance of its policy.

2 And your petitioner further alleges that he ever was loyal to the United States Government, and not inimical thereto, and gave no aid to the rebellion; that he immediately renewed his oath of fealty and allegiance to the United States, accepting on his part the proffered faith of the United States, and in all respects made his conduct strictly conformable to the requirements of the proclamation, and became justly and legally entitled to all the benefits and privileges it conferred.

That he pursued his usual and ordinary avocations as required; and in pursuance of which, on the 9th day of September, 1862, in the city of New Orleans, of the firm of Burbridge & Co., a mercantile house of like loyalty with himself, for a valuable consideration paid, he purchased all of the sugars, molasses, and rum then situate and stored on the Leo Johnson plantation, near the La Fourche crossings of the Opelousas Railroad, in the State of Louisiana, who were the owners of the same, to wit, seven hundred and four hogsheads of sugar, seven hundred barrels of molasses, and three hundred barrels of rum.

That, by virtue of said sale and purchase, your petitioner became the lawful and actual possessor of the same.

That, on the 9th day of November, 1862, said Butler, as commander-in-chief of the military department known as the "Department of the Gulf," acting for and in behalf of the United States, and as its agent, issued his general order known as "Order 91," wherein, among other articles not necessary to enumerate, but especially relying upon par.

agraphs numbered three, four, five, and ten of said order herein set forth. * * * * * *

Paragraph III. "That Major Joseph M. Bell, provost judge, president, Lieut. Col. J. B. Kinsman, A. D. C., Capt. Fuller, (75th N. Y. Vols..) provost marshal of the district, be a commission to take possession of the property in said district, to make accurate inventory of the same, and gather up and collect all such personal property, and turn over to the proper officers upon their receipts such of said property as may be required for the use of the United States Army; to collect together all the other personal property and bring the same to New Orleans, and cause it to be sold at public auction to the highest bidders, and, after deducting the necessary expenses of care, collection, and transportation, to hold the proceeds thereof, subject to the just claims of loyal citizens, and those neutral foreigners who, in good faith, shall appear to be the owners of the same.

3 P. IV. "Every loyal citizen or neutral foreigner who shall be found in actual possession and ownership of any property in said district, not having acquired the same by any title since 18th day of September last, may have his property returned or delivered to him without sale, upon establishing his condition to the judgment of the commission.

P. V. "All sales made by any person not a loyal citizen or foreigner neutral, since the 18th day of September, shall be held void, and all sales whatever, made with the intent to deprive the Government of its rights of confiscation, will be held void, at what time soever made."

P. X. "The commission are empowered and authorized to hear and determine and definitely report upon all questions of the loyalty or disloyalty or neutrality of the various claimants of property within said district; and further, to report such persons as, in their judgment, ought to be recommended by the commanding general to the President for amnesty and pardon, so that they may have their property returned: to the end that all persons that are loyal may suffer as little injury as possible, and that all persons who have been heretofore disloyal may have an opportunity now to prove their loyalty and return to their allegiance, and save their property from confiscation, if such shall be the determination of the Government of the United States."

That the said Butler, acting as military commander and agent of the United States, as aforesaid, on about the 10th day of November, 1862, through the agency of the commission aforesaid, did seize and take possession of the sugars, molasses, and rum aforesaid, transport the same to New Orleans, and convert the same into money, seizing the property belonging to your petitioner to his own use, and that belonging to disloyal persons to the use of the United States.

That your petitioner's property was not seized or captured as abandoned property, or for the use of the Army or Navy, but for his sole and exclusive use and benefit, and the proceeds were taken and held in trust for your petitioner by the agents aforesaid of the United States.

That said commission did sit and hear evidence upon your petitioner's claim to have the proceeds of said property restored to him, and did award and determine that your petitioner was loyal, and the owner of the same, and that the proceeds of the same should be paid over to your petitioner; that the net value of two hundred and seventy-eight hogsheads of said sugar, amounting to twenty-two thousand and eighteen dollars and ninety-seven cents, was actually paid over to your petitioner; that the remaining four hundred and twenty-six hogsheads of sugar, part and parcel of said lot, and which sold for the

same average sum as the first parcel, was not paid to your petitioner nor the value of the molasses and rum, for the reason that your peti, tioner was not able to make proof at the precise time—it having been brought in two separate parcels—of the identity of the property, by reason of the capture and death of the agent in charge of its removal, and the destruction and loss of his memorandum-book at or about the time of its removal, and the commission being dissolved prior to the 15th of December, 1862, by order of General Banks, then in command of the Department of the Gulf, and of his order to the commissioners to pay over to his quartermaster, Colonel Holabird, all the money in their hands, that belonging to your petitioner as well as other moneys relating to the commission, belonging to the United States. This sum was not paid to your petitioner.

That said commission paid over to Colonel Holabird, under the orders of General Banks, on the 15th of December, the sum of three hundred and thirty-two thousand five hundred and seventy-six dollars and twenty-two cents, which sum embraced your petitioner's money, being the proceeds of said sugars, molasses, and rum.

That said money was received by said Holabird to the use of the United States, and, in trust for your petitioner, accounted for by him to the Quartermaster General's Office as public money, and disbursed by him as public money; that his accounts of receipts and disbursements of said fund have been duly approved by the Quartermaster General, and duly settled and approved by the accounting officers of the Treasury; and so the same has come to the use and possession of the United States, with the full knowledge of the trust and conditions upon which it was received.

The precise sums realized by the United States from the sale of the sugars, molasses, and rum, and now in its hands and possession, your petitioner is unable to state; but, from the best information in his possession, he states it to be seventy thousand dollars, and refers to the records in the War Department to correct his statement, whether it may increase or diminish the sum justly due him.

That the War Department refuse to pay or allow his claim, or any part thereof.

Your petitioner further alleges that the United States are justly indebted to him in one other sum of seventy thousand dollars, for so much money had and received to his use before this time, which, in equity and justice, the United States should refund to him, and herein refers to his petition for particulars of the same, and in consideration thereof promise to pay him.

T. J. D. FULLER,
Attorney and Solicitor, with Special Power filed.

WASHINGTON CITY, *ss:*

OCTOBER 11, 1867.

Personally came before me, a notary public, city of Washington, T. J. D. Fuller, and made oath that the matters and things stated in the foregoing petition are just and true, according to his best knowledge and belief; that no assignment of this claim, or any part thereof, has been made, except as stated therein; that he believes said claimant is justly entitled to the amount he claims, after allowing all just credits and offsets in favor of the United States.

N. CALLAN,
Notary Public.

6 United States Court of Claims.

R. H. MONTGOMERY vs. THE UNITED STATES. No. 2921.

Amendment of petition.

And your petitioner further alleges that he is entitled by law to have and recover from the United States the proceeds of said sugars described and claimed as aforesaid, by virtue of the provisions of the act of Congress, approved March 12, 1863.

T. J. D. FULLER,
Solicitor, with Special Powers.

Subscribed and sworn to before me this 18th day of November, A. D. 1868, and that the matters and things in said amendment set forth are just and true, according to affiant's best knowledge and belief.

[L. S.] N. CALLAN, *Notary Public.*

7 In the United States Court of Claims. December term, A. D. 1868.

ROBERT H. MONTGOMERY vs. THE UNITED STATES. No. 2921.

And the said defendants, by their Attorney General, come and make answer to the petition of the claimant herein; and, not confessing the same or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant in the sum of seventy thousand dollars, the said defendants say that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant has, at all times, borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney General.

8 In the Court of Claims.

ROBERT H. MONTGOMERY vs. THE UNITED STATES. 2921.

And now, to wit, 28th of March, A. D. 1870, the court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said Robert H. Montgomery take nothing by his suit, & that his petition be dismissed.

By the court.

A true copy of record.

9 In the Court of Claims.

ROBERT H. MONTGOMERY
vs.
THE UNITED STATES. } 2921.

And now the claimant, after final judgment dismissing his petition, appeals from the judgment of the court to the Supreme Court of the United States, and prays the court to certify and allow the same.

By his attorney,

T. J. D. FULLER.

Filed April 9, 1870, in the clerk's office.

Ordered that the appeal prayed in the case of Robert H. Montgomery vs. The United States, 2921, be allowed.

April 11, 1870.

By the court.

10 And, from the evidence adduced on the trial of this cause, the court do find and certify to the following state of facts:

1st. That the claimant is a British subject by birth, and to the present time an alien; that, for many years prior to the time herein referred to, he had been domiciliated in New Orleans; that he was friendly to the United States Government, and gave no aid or encouragement to the late rebellion, or to persons engaged therein; that, by reason of the privileges by law extended by the British government to the citizens of the United States, to sue that government in its own courts, the claimant, as a British subject, is entitled to maintain a suit vs. the United States Government in the Court of Claims.

2nd. That Major General Butler captured and took military
11 posession of the city of New Orleans on or about the first day of May, A. D. 1862, and immediately thereafter issued the following proclamation:

"*Proclamation.*

"HEADQUARTERS DEPARTMENT OF THE GULF,
"*New Orleans, May 1st,* 1862.

"The city of New Orleans and its environs, with all its interior and exterior defences, having been surrendered to the combined naval and land forces of the United States, and having been evacuated by the rebel forces, in whose possession they lately were, and being now in occupation of the forces of the United States, who have come to restore order, maintain public tranquility, enforce peace and quiet under the Constitution of the United States, the major general commanding the forces of the United States in the Department of the Gulf hereby makes known and proclaims the object and purposes of the Government
12 of the United States in thus taking possession of the city of New Orleans, and the State of Louisiana, and the rules and regulations by which the laws of the United States will be for the present, and during a state of war, enforced and maintained, for the plain guidance of all good citizens of the United States, as well as others who may heretofore have been in rebellion against their authority.

"Thrice before has the city of New Orleans been rescued from the hand of a foreign government and still more calamitous domestic insurrection by the money and arms of the United States. It has, of late, been under the military control of the rebel forces, claiming to be the peculiar

friends of its citizens, and at each time, in the judgment of the commander of the military forces holding it, it has been found necessary to preserve order and maintain quiet by the administration of law
13 martial. Even during the interim from its evacuation by the rebel soldiers and its actual possession by the soldiers of the United States, the civil authorities of the city have found it necessary to call for the intervention of an armed body, known as the 'European Legion,' to preserve public tranquility. The commanding general, therefore, will cause the city to be governed, until the restoration of municipal authority and his further orders, by the law martial, a measure for which it would seem the previous recital furnishes sufficient precedents.

"All persons in arms against the United States are required to surrender themselves, with their arms, equipments, and munitions of war. The body known as the 'European Legion,' not being understood to be in arms against the United States, but organized to protect the lives and property of the citizens, are invited still to coöperate with the
14 forces of the United States to that end, and, so acting, will not be included in the terms of this order, but will report to these headquarters.

"All flags, ensigns, and devices tending to uphold any authority whatever, save the flag of the United States and the flags of foreign consulates, must not be exhibited, but suppressed. The American ensign, the emblem of the United States, must be treated with the utmost deference and respect by all persons, under pain of severe punishment.

"All persons well disposed towards the Government of the United States who shall renew their oath of allegiance will receive the safeguard and protection, in their persons and property, of the United States, the violation of which by any person is punishable with death.

"All persons still holding allegiance to the Confederate States will be deemed rebels against the Government of the United States, and regarded and treated as enemies thereof.

15 "All foreigners not naturalized, and claiming allegiance to their respective governments, and not having made oath of allegiance to the supposed government of the Confederate States, will be protected in their persons and property as heretofore under the laws of the United States.

"All persons who may heretofore have given their adherence to the supposed government of the Confederate States, or have been in their service, who shall lay down and deliver up their arms, and return to peaceful occupations, and preserve quiet and order, holding no further correspondence, nor giving aid and comfort to the enemies of the United States, will not be disturbed, either in person or property, except so far, under the orders of the commanding general, as the exigencies of the public service may render necessary.

"The keepers of all public property, whether State, national, or
16 confederate, such as collections of art, libraries, museums, as well as all public buildings, all munitions of war, and armed vessels, will at once make full return thereof to these headquarters; all manufacturers of arms and munitions of war will report to these headquarters their kind and places of business. All rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States.

"All inhabitants are enjoined to pursue their usual avocations; all shops and places of business and amusement are to be kept open in the accustomed manner; and services to be had in churches and religious houses as in times of profound peace.

"Keepers of all public houses, coffee houses, and drinking saloons, are to report their names and numbers to the office of the provost marshal, will there receive license, and be held responsible for all
17 disorders and disturbances of the peace arising in their respective places.

"A sufficient force will be kept in the city to preserve order and maintain the laws.

"The killing of an American soldier by any disorderly person, or mob, is simply assasination and murder, and not war, and will be so regarded and punished. The owner of any house or building, in or from which such murder shall be committed, will be held responsible therefor, and the house be liable to be destroyed by the military authority.

"All disorders and disturbances of the peace, done by combination and numbers, and crimes of an aggravated nature, interfering with forces or laws of the United States, will be referred to a military court for trial and punishment; other misdemeanors will be subjected to the municipal authority, if it chooses to act; civil causes between party and party will be referred to the ordinary tribunals; the levy and
18 collection of all taxes, save those imposed by the laws of the United States, are suppressed, except those for keeping in repair and lighting the streets, and for sanitary purposes. Those are to be collected in the usual manner.

"The circulation of confederate bonds, evidences of debt, except notes in the similitude of bank notes, issued by the Confederate States, or scrip, or any trade in the same, is strictly forbidden. It having been represented to the commanding general, by the civil authorities, that these confederate notes, in the form of bank notes, are, in a great measure, the only substitute for money which the people have been allowed to have, and that great distress would ensue among the poorer classes, if the circulation of such notes was suppressed, such circulation will be permitted so long as any one may be inconsiderate enough to receive them, till further orders.

19 "No publications, either by newspaper, pamphlet, or handbill, giving accounts of the movements of soldiers of the United States within this Department, reflecting in any way upon the United States or its officers, or tending in any way to influence the public mind against the Government of the United States, will be permitted; and all articles of war news, or editorial comments, or correspondence making comments upon the movements of the armies of the United States, or the rebels, must be submitted to the examination of the officer who will be detailed for that purpose from these headquarters.

"The transmission of all communications by telegraph will be under the charge of an officer from these headquarters.

"The armies of the United States came here, not to destroy, but to make good; to restore order out of chaos, and the government of laws in the place of the passions of men; to this end, therefore, the
20 efforts of all well-disposed persons are invited, to have every species of disorder quelled; and if any soldier of the United States should so far forget his duty or his flag as to commit any outrage upon any person or property, the commanding general requests that his name be instantly reported to the provost guard, so that he may be punished, and his wrongful act redressed.

"The municipal authority, so far as the police of the city and crimes are concerned, to the extent before indicated, is hereby suspended. All assemblages of persons in the streets, either by day or night, tend to disorder, and are forbidden. The various companies composing the fire department in New Orleans, will be permitted to retain their organiza-

tions, and are to report to the provost marshal, so that they may be known, and not interfered with in their duties.

21 "And, finally, it may be sufficient to add, without further enumeration, that all the requirements of martial law will be imposed so long as, in the judgment of the United States authorities, it may be necessary. And, while it is the desire of these authorities to exercise this government mildly, and after the usages of the past, it must not be supposed that it will not be vigorously and firmly administered as occasion calls.

"By command of Major General Butler.

"GEO. C. STRONG,
"*A. A. General & Chief of Staff.*"

3rd. That the claimant, during the summer and latter part of the year A. D. 1862, was engaged in purchasing sugars and molasses, more or less, in the city New Orleans, and shipping them north, under such restrictions and regulations as the law permitted.

4th. That the claimant, on the ninth day of September, A. D.

22 1862, within the city of New Orleans, purchased of the firm of J. W. Burbridge & Co., loyal persons to the United States, and residents of, and doing business in, New Orleans, through the agency of Thomas D. Harris, who was the confidential book-keeper and general agent of said firm of Burbridge & Co., all of the sugars, molasses, and rum then situate and being on the sugar plantation of Leo. L. Johnson, near the La Fourche crossings of the Opelousas Railroad, and the following written agreement of sale, and order for delivery of the same, were then entered into and made:

"Know all men by these presents that it has been agreed, and it is hereby agreed, between the undersigned, as follows, to wit: Thomas D. Harris, acting as the attorney-in-fact of J. W. Burbridge & Co., of this city, the agents of Leo. L. Johnson, of the parish of La Fourche, in this State, has sold, and hereby does sell, unto Robert H. Montgomery,

23 of this city, the following crop, belonging to said Leo. L. Johnson, contained in his sugar-house and purgery, on his plantation, in the parish of La Fourche, near La Fourche crossings, to wit: Six hundred and five hogsheads of sugar, seven hundred barrels molasses, and three hundred barrels rum, at the following prices, to wit: For the sugar, at 4½ cents per pound; for the molasses, at 20 cents per gallon; and for the rum, at 50 cents per gallon, the weight and quantity to be determined at the time, and upon the delivery thereof in New Orleans.

"The said Montgomery, in consideration of said sales so to him made, has paid, in ready money, the sum of $5,000 to said Harris, attorney-in-fact aforesaid, the receipt whereof is hereby acknowledged, and accepted as so much on account of the first sugar, molasses, or rum delivered to him, said Montgomery, as aforestated; the balance to be paid by said Montgomery at each future delivery of said sugar, molasses, and

24 rum.

"Thus agreed, and done in duplicate, at New Orleans, this 9th of September, 1862. "J. W. BURBRIDGE & CO.,
"Per THOMAS D. HARRIS, *Attorney.*
"R. H. MONTGOMERY

"Witnesses: "JNO. L. CAVANNA, J. C. MCALLESTER."

"B.

"NEW ORLEANS, *September* 9, 1862.

"The overseer on the plantation of Leo. L. Johnson will please deliver

to the order of Robert H. Montgomery the entire crop of sugar, molasses, and rum, contained in the sugar-house and purgeries, &c., on said plantation, the same having been sold to him this day.

"J. W. BURBRIDGE & CO.,
"Per T. D. HARRIS.

"Deliver the above sugar, molasses, and rum to William P. Maloney or order. "R. H. MONTGOMERY."

25 5th. That all the parties to the contract of sale resided in New Orleans; that the sugars and produce in question then being situated outside of the Union or American lines of occupation, no actual delivery was made, or possession taken of the same, nor was any attempt made so to do until said sugars were brought within the Federal lines by the forces of the United States; that the firm of Burbridge & Co. was composed of J. W. Burbridge alone; that, at the time of the making of the contract, he was at the North, and Thomas W. Harris was his general agent, in charge of his business in his absence, with authorized power to act for him.

6th. That the sum of five thousand dollars was paid on account of said purchase, at the date of the agreement, as in said contract of sale is stated; nine thousand dollars subsequently; and the price agreed to be paid was a fair value for the same, where the sugars then were.

26 7th. That, on the 9th day of November, A. D. 1862, Gen'l Butler issued his order, known as Order No. 91, in the words and figures following:

"HEADQUARTERS DEPARTMENT OF THE GULF,
"*New Orleans, November 9th*, 1862.

["General Orders, No. 91.]

"The commanding general, being informed and believing that the district west of the Mississippi River, lately taken possession of by the United States troops, is most largely occupied by persons disloyal to the United States, and whose property has become liable to confiscation under the acts of Congress and the proclamation of the President, and that sales and transfers of said property are being made for the purpose of depriving the Government of the same, has determined, in order to secure the rights of all persons, as well as those of the Government, and for the purpose of enabling the crops now growing to be taken care of and secured, and the unemployed laborers to be set
27 at work, and provision made for payment of their labor, to order as follows:

"I. That all the property within the district to be known as the 'District of La Fourche,' be, and are hereby, sequestered, and all sales or transfers thereof are forbidden, and will be held invalid.

"II. The district of La Fourche will comprise all the territory in the State of Louisiana lying west of the Mississippi River, except the parishes of Plaquemines and Jefferson.

"III. That Major Joseph M. Bell, provost judge, president, Lieut. Col. J. B. Kinsman, A. D. C., Capt. Fuller, (75th N. Y. Vols.,) provost marshal of the district, be appointed a commission to take possession of the property in said district, to make an accurate inventory of the same, and gather up and collect all such personal property, and turn over to the proper officers, upon their receipts, such of said prop-
28 erty as may be required for the use of the United States Army;

to collect together all the other personal property, and bring the same to New Orleans, and cause it to be sold at public auction to the highest bidders; and, after deducting the necessary expenses of care, collection, and transportation, to hold the proceeds thereof, subject to the just claims of loyal citizens and those neutral foreigners, who, in good faith, shall appear to be the owners of the same.

"IV. Every loyal citizen or neutral foreigner who shall be found in actual possession and ownership of any property of said district, not having acquired the same by title since the 18th day of September last, may have his property returned or delivered to him without sale, upon establishing his condition to the judgment of the commission.

"V. All sales made by any person not a loyal citizen or foreign neutral, since the 18th day of September, shall be held void; and all sales whatever, made with the intent to deprive the Government
29 of its rights of confiscation, will be held void, at what time soever made.

"VI. The commission is authorized to employ, in working the plantation of any person who has remained quietly at his home, whether he be loyal or disloyal, the negroes who may be found in said district, or who have, or may hereafter claim, the protection of the United States, upon the terms set forth in the memoranda of a contract heretofore offered to the planters of the parishes of Plaquemines and St. Bernard, or white labor may be employed, at the election of the commission.

"VII. The commissioners will cause to be purchased such supplies as may be necessary, and convey them to such convenient depots, as to supply the planters in the making of the crop, which supplies will be charged against the crop manufactured, and shall constitute a lien thereon.

30 "VIII. The commissioners are authorized to work, for the account of the United States, such plantations as are deserted by their owners, or are held by disloyal owners, as may seem to them expedient, for the purpose of saving the crops.

"IX. Any persons who have not been actually in arms against the United States since the occupation of New Orleans by its forces, and who shall remain peacefully upon their plantations, affording no aid or comfort to the enemies of the United States, and who shall return to their allegiance; and who shall, by all reasonable methods, aid the United States when called upon, may be empowered bythe commission to work their own plantations, to make their own crop, and to retain possession of their own property, except such as is necessary for the military uses of the United States. And to all such persons the commission are
31 authorized to furnish means of transportation for their crops and supplies at just and equitable prices.

"X. The commissioners are empowered and authorized to hear, determine, and definitely report upon all questions of the loyalty, disloyalty, or neutrality of the various claimants of property within said district; and, further, to report such persons as, in their judgment, ought to be recommended by the commanding general to the President for amnesty and pardon, so that they may have their property returned: to the end that all persons that are loyal may suffer as little injury as possible, and that all persons who have been heretofore disloyal may have opportunity now to prove their loyalty, and return to their allegiance, and save their property from confiscation, if such shall be the determination of the Government of the United States.

"By command of Major General Butler:

"GEO. C. STRONG,
"*A. A. G., Chief of Staff.*

32 8th. That, immediately after issuing of said order No. 91, a movement of the United States forces was made to take possession of the produce upon the plantations in the La Fourche district, and these seized on the Leo. L. Johnson plantation, and brought down to the city of New Orleans, and delivered to the military sequestration committee, some five hundred hogsheads of sugar, on the 17th, 18th, and 19th days of November, being a portion of the sugars embraced in said contract of Burbridge & Co., marked and designated upon the books and records of the sequestration committee by the letters A, B, C, D, E, and H, and sold immediately, varying in price from 7¾ cents to 8 cents per lbs, realizing therefrom the sum of forty-three thousand eight hundred and eight dollars and $\frac{80}{100}$; and, after deducting from the same the charges
33 of freight, ferriage, tarpolins, and commissions of sale 2½ per cent., amounting to $6,457 32, left the nett proceeds of said sugars thirty seven thousand three hundred fifty-one dollars $\frac{49}{100}$, which sum, under the order of General Banks, was paid over to Col. Holabird, his chief quartermaster general, together with other sums of money, and the same has been accounted for to the United States by him, in a legal and proper manner; and the same has been covered into the United States Treasury, in due and proper form, and by the lawful officers of the United States.

9th. That the military agent who seized and took charge of the shipment of this first lot of sugars from the Leo. L. Johnson plantation was captured by the rebels, and his life destroyed, together with his memorandums of the sugars taken and the place from whence taken.

10th. That, subsequently, between the 3rd and the 9th days of
34 December, A. D. 1862, the balance of the sugars remaining on the Leo. L. Johnson plantation, and embraced in the contract, were removed to New Orleans, being two hundred and seventy-four hogsheads, and sold, and the net proceeds, amounting to about $22,018 97, was sent by the sequestration commission, but subsequently was claimed by the claimant as his property, or the proceeds of it. Application was by him made to the sequestration commission for its return, and after full hearing and investigation by said commission, the proceeds of this lot of sugars was ordered to be paid to claimant, and was so paid, and he receipted therefor.

11th. The sequestration commission, organized by order 91, upon the assumption of the command of the Department of the Gulf, by General Banks, was dissolved on or about the fifteenth of December, A. D.
35 1862. That no opportunity was afforded the claimant to make claim for the first shipment of sugars before the sequestration commission prior to its dismission, by reason of the difficulty existing at the time to obtain proof of the identity of the first parcel of sugars shipped to New Orleans from said Leo. L. Johnson's plantation.

12th. The court find the fact to be, that this first shipment of sugars, between the 11th and 17th days of November, 1862, came from the Leo. L. Johnson plantation, and constituted a portion of the sugars embraced in the agreement of sale of the 9th of September, 1862, from Burbridge & Co. to the claimant, and the nett sum realized from the same, now in the Treasury of the United States, is ($37,351 49) thirty-seven thousand three hundred and fifty-one $\frac{49}{100}$ dollars.

13th. The court further find, and certify the fact to be, that Burbridge and Co., for two years prior to May, 1862, had been the factors
36 and agents of Leo. L. Johnson, and had made advances to him to enable him to make his crop on the Webster plantation, and that Johnson's indebtedness for such advances prior to Sept. 9, 1862, amount-

ed to the sum of one hundred and thirty-one thousand three hundred and sixty dollars and sixty-seven cents.

14. [That the custom & manner of doing business at New Orleans, where factors make advances to planters in money, and in such articles as they may want, to enable them to make their crops, the factor has a lien or privilege upon the crops so made for his advances. That in such cases the factor oftentimes makes sale of said crop lying upon said plantation, or at New Orleans, as may be most convenient. That by such usage and custom the planter cannot make sale of his crop to defeat the factor's lien, without first paying him the amount of his advance.]

15. [That Burbridge & Co. were authorized [by] Leo. L. Johnson, & as a part of the original agreement made between them to have a lien, and he was authorized to make sale of the crop of sugars & produce
37 on the plantation, for the purpose of reimbursing him the amount of his advances.]

16. [The sugars, &c., in question were of the crop of the year 1860 and 1861. Leo. L. Johnson resided on his cotton plantation in the State of Arkansas, and within the rebel lines.]

17. There was no evidence that Leo. L. Johnson, at any time, disputed or questioned the authority of Burbridge & Co. to make the sale of the crop of sugars in question.

18. And on this evidence the majority of the court held and decided the claimant was not entitled to recover, and ordered his petition to be dismissed.

By the court.

Numbers 14, 15, & 16 disallowed as irrelevant, upon the ground that the sale of the captured property was made by Burbridge & Co., for and in the name of Leo. L. Johnson.

E. G. L.

38 In the Court of Claims.

ROBERT H. MONTGOMERY
vs.
THE UNITED STATES. } No. 2921.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the counsel for claimant, for the allowance of an appeal, as filed in the clerk's office April 9, 1870, and of the order of the court April 11, 1870, allowing the same; of the findings of fact & of law on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington, this 24th day of December, 1870.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

(Indorsement on cover:) No. 515. Robert H. Montgomery, appellant, vs. The United States. Court of Claims. Filed 1st March, 1871.

Supreme Court of the United States.

DECEMBER TERM, 1871.

R. H. MONTGOMERY, Appellant,
vs.
THE UNITED STATES, Appellee.
No. 297.

APPELLANT'S BRIEF.

This action was instituted in the Court of Claims, to recover from the United States the sum of $37,351 $\frac{49}{100}$, under the provisions of the so-called "*Captured and abandoned property act of March* 12, 1863, (sec. 2,) which enacts, among other things, "*that any person claiming to have been the owner of such abandoned and captured property, may at any time, within two years, bring his action.*" * * * "And 'on proof, to the satisfaction of said court, of his ownership 'of said property, and of his right to the proceeds thereof, 'may recover,'" &c.

A majority of the Court of Claims held, that the appellant was not entitled to recover, and ordered his petition to be dismissed.

To this ruling of the court the appellant alleges there is error, and makes the following assignment of errors.

First. The court erred in holding that the claimant was not the owner of the property, nor entitled to the proceeds of the same.

Second. It erred in holding that the written contract of sale of September 9, 1862, together with the written order of the same date, for the delivery of the sugars, did not constitute a sale of the sugars.

Third. It erred in holding the proper construction of the contract to be, a contract for a sale—an executory contract, and not an executed one.

Fourth. It erred in holding the contract of sale was void between the parties thereto for want of actual delivery, before seizure by the United States.

Fifth. It erred in holding that the *intention of the parties* to the sale, to have the title to the property pass, would not prevail without an actual delivery.

Sixth. It erred in construing the contract to be, in legal contemplation, a sale between Leo L. Johnson and the claimant.

Seventh. It erred in holding that the facts certified in the 14th, 15th, and 16th specifications *were irrelevant*, on the ground that the sale purported to be made by Burbridge & Co., for and in behalf of said Johnson, when Burbridge & Co. had a *mortgage* or *lien* upon the sugars, and made the sale in their own right, to reimburse themselves for advances previously made to make the sugars.

Eighth. It erred in holding that Burbridge & Co. had not such an interest in the property as authorized them to make sale of the sugars, and convey a valid title thereto to the purchaser, as against the United States.

Ninth. It erred in holding that, under General Butler's proclamation of May 6, 1862, and his order 91, and the act of March 12, 1863, the United States were not the trustees of the fund in their hands for the benefit of the claimant.

Tenth. It erred in holding that property situated beyond or outside of the federal lines, and within the Confederate lines, was not a lawful subject-matter of sale, between loyal citizens residing within the federal lines, the contract being made there.

As the court below gave no distinct conclusions of law upon the facts found, and ordered the petition to be dismissed on general grounds, the assignment of errors are drawn from the opinion of the court, as reported in 5 Claims Reports, (p. 658,) and are drawn with a view to meet the case in the various aspects it may be viewed.

The first five assignments of error presents the general question of the true construction of the contract of September 9, 1862, and whether the title to the property passed to the claimant without an actual or manual delivery of it.

The court below say, in their opinion: "*A careful evam-*
'*ination of the agreement between Burbridge & Co. and the*
'*claimant*, (admitting the authority of Burbridge & Co. to
'make it,) satisfies us that no ownership of the property
'vested in Montgomery. The transaction did not consti-
'tute a sale, but only an executory contract, for a future sale
'and delivery."

And the court proceed further to say, and give their reasons for it, that the rule established by all the leading authorities, English and American, is, "*that where a sale*
'*is agreed upon of goods, and anything remains to be done to*
'*ascertain the quantity or price*, the property, in such case,
'does not vest in the buyer until this is done."

The correctness of this statement would not be questioned if the words "*by the vendor*" were inserted after the words "*to be done*," so that the proposition, as amended, would read, "*where a sale is agreed upon of goods*, and anything
'remains to be done BY THE VENDOR to ascertain the quan-
'tity or price, the property, in such case, does not vest in the buyer until this is done."

And because of this omission, this oversight or failure to make the proper distinction, found in the authorities, we allege error.

That this distinction does exist, the following authorities are cited in support of it:

Crofoot *v.* Bennett, 2 Comstock, 258.
Leonard *v.* Davis, 1 Black, U. S., 483.

In this latter case, a sale of logs, the plaintiff had actually declared upon the contract of sale, as an executory one, but the court say: "Where the terms of sale are agreed
'upon, and the bargain is struck, and everything the seller
'has to do with the goods is complete, the contract of sale
'becomes absolute as between the parties, without actual

'payment or delivery of the property, and the property and 'the risk of accident vests in the buyer.''

And to the same affect are the latest English authorities. See Benjamin on Sales, p. 516, (foot notes.)

Now, reading this contract in the light of these authorities, and the order of delivery, was there any thing remaining to be done by the vendors? The price was agreed upon, a portion of the purchase money was paid in advance, the balance of the purchase money was to be ascertained by the vendee in a particular way. The vendor acknowledges he does sell, and has sold; he gives an order for the delivery of the thing sold to the vendee, upon the person in whose custody the property was, and reiterates therein that he has sold it, and therefore orders the delivery of it to the vendee.

The delivery was to be on the plantation, where the property then was. The vendor thereby parted with all control over the property. The property had to be transported to New Orleans for weight, by the vendee, and at his own cost and charge. Surely the law would not require a second delivery of the property to pass the title.

Under the 5th assignment of errors, the question of intention, upon the latest authorities, it is urged the court erred. It manifestly was the intention of the parties to this contract, to have the title pass, whether they complied with all the formalities of a legal sale or not; and upon this point, the following citations of authority is made.

Riddle *v.* Varnum, 20 Pick., p. 280.
Benjamin on Sales, p. 227.
Turley *v.* Bates, 2 H. & C., p. 200.
Logan *v.* Le Mesurier, 6 Moore, P. C., p. 116.
Hind *v.* Whiteham, 7 East, 558.

The case of Turley *v.* Bates seems to be identical, in facts and principle, with the one at bar. "The jury found that the bargain between the parties was for an entire heap of fire-clay, at 2*s.* per ton. The buyer was at his own expense to load and cart it away, and to have it weighed at a certain

machine, which his carts would pass on their way when carrying off the clay. All the authorities were reviewed by the court, and it was held the property had passed by the contract.

And Strong, J., in Crofoot *v.* Bennett, says: "If the goods sold are clearly identified, then, although it may be necessary to number, weigh, or measure them, in order to ascertain what would be the price of the whole, at a rate agreed upon between the parties, the title will pass." In Gillet *v.* Hill, (2 C. & M., p. 530,) Bayley, J. says: "The cases may be divided into two classes: One, in which there has been a sale of goods, and something remains to be done by the vendor, and until that is done, the property does not pass to the vendee, so as to entitle him to maintain trover. The other class of cases is where there is a bargain of a certain quantity ex a greater quantity, and there is a power of selection in the vendor, to deliver which he thinks fit; then the right to them does not pass to the vendee, until the vendor has made his selection, and trover is not maintainable until that is done. If I agree to deliver a certain quantity of oil, as ten out of eighteen tons, no one can say which part of the whole quantity I have agreed to deliver, until a selection is made. There is no individuality until it is divided."

And Mr. Benjamin says, the only case to be found in the reports, in apparent contradiction to this principle of the law of sales, is Whitehouse *v.* Frost, (12 East, p. 614,) although subsequently explained, is scarcely ever mentioned without disapproval.

In the case at bar, the sale was, of all the sugars on the plantation, and no separation was to be made: *the whole was individualized as the subject-matter of sale.*

The 6th, 7th, and 8th assignments of error may be considered under one head. Assuming that Burbridge & Co. were the factors of Leo L. Johnson, and had made the advances to the amount specified, in the years 1860 and 1861; and, by agreement with Johnson, had a lien on the crop

of the plantation, and had authority to sell the sugars to reimburse themselves for the advances so previously made, does the terms or language of the contract of sale, divest them of that authority? The answer is, reading the contract in the light of then existing facts, the expressions "*agent of Johnson*," "*the property of Johnson*," are merely words descriptive of the property sold, to identify it.

Burbridge & Co. had a power, coupled with an interest, in and over the produce of the plantation.

The fact, that afterwards, they became opposing belligerents, would not divest Burbridge & Co. of any vested interest in the property, previously acquired.

At most, Burbridge & Co's interest in the property, and the right to take possession, would only be suspended and held in abeyance, until the existing disability should be removed.

Johnson was no party to the sale; his assent or dissent would not in anywise affect the interest of the parties to it.

If the *jus desponendi* was in Burbridge & Co., if they described the property as belonging to Johnson, they or their vendee are not estopped by it, as an admission conclusive against them.

It does not lay in the mouth of the appelles to raise this objection. As between Montgomery, Burbridge & Co., and Johnson, if the title passed, the United States should not be permitted to object.

Burbridge & Co. were, at all events, the special owners of the property, if not general owners.

If their special property exceeded the value of the general property, or if, as security, it was less than their debt, they could convey a title to the property, co-extensive with their lien. The debt, for which they held a lien on the property, was double the value of the property itself.

If the property was of greater value than the amount of their *lien*, they had the power to sell, and would at best be only the trustees of Johnson for any surplus over and above the sum necessary to discharge their lien.

Upon the question of the authority of Burbridge & Co. to sell the sugars, the following cases are cited:

Mitchell *v.* Winslow, 2 Story R., 644.
Simonds *v.* Hibbert, 1 R. & M., 719.
Sullivan *v.* Tuck, 1 Maryland Decisions, 59.

Property in goods is either general or special.

There is no intermediate property.

For instance, the general property in goods, levied upon under execution, is in the debtor; the special property, in the officer making the levy.

The general or special owner may maintain trover for the goods.

Ingersoll *vs.* Van Bokklein, 7 Cowen, p. 670.

A right of lien in goods is such a special property in them, as will support an action of trover, even against one who converts them under the authority of the general owner.

Same authority, (note *a*.)

This court held, in Anderson's case, under the captured and abandoned property act: The United States, as to loyal persons, and friendly neutrals held the proceeds of the property in the light of trustees.

In this case, under the proclamation of General Butler and of his general order 91, the case is even stronger. For these acts of General Butler have received the approbation of the Government, and were so recognized by this court in the case of the *Venice*, (2 Wallace, p. 259,) wherein the court say:

"All foreigners not naturalized, claiming allegiance to their respective governments, and not having made oath of allegiance to the government of the Confederate States, will be protected in their persons and property, as heretofore, under the laws of the United States, did but reiterate the rules established by the legislative and executive action of the national Government."

That the sugars were in rebel territory constitutes no ob-

jection to the validity of the sale, as the contract was made within federal territory, between loyal persons, there living. It could make no difference to the United States, which one of its own loyal citizens was the owner, for the time being, of personal property within the rebel lines. And whether the property was real or personal, it was equally a lawful subject-matter of sale and transfer from one loyal citizen to another, provided no act was done violating non-intercourse, as the case finds there was none in this instance.

Again: By the local law of Louisiana, Burbridge & Co. had authority to sell the crop, to reimburse themselves, as the FACTORS of Leo L. Johnson, for advances made to him to enable him to make the crop.

It had this authority, from the custom and usage of business between factors and planters.

It was further strengthened by an agreement, specific and definite in its terms, between Johnson and his factors, Burbridge & Co., that the latter should have the customary lien, and addition thereto, the right to sell the crop for the purpose of reimbursing the advances; and this agreement was coeval with the advances, as early as the year 1860.

For these resons the court is asked to reverse the decision of the court below.

Other points in the case, as to the status of the claimant, and his right to sue, and the amount of money in the treasury to which he is entitled, are undisputed.

T. J. D. FULLER,
Counsel for Claimant.